No. 16,224

In the

United States Court of Appeals

For the Ninth Circuit

JAMES FLOOD and MARY EMMA STEBBINS, as Trustees of the Trust created by Paragraph III of the Last Will of James L. Flood, Deceased,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court for the Northern District of California.

Brief for Appellants

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OPINION BELOW

The memorandum opinion rendered below by the District Court (R. 62-77) is reported in 157 F. Supp. 438 (N.D. Cal. 1957).

JURISDICTION

This appeal is taken from the judgment of the District Court rendered in two eminent domain proceedings brought by the United States of America through its

Administrator of General Services and under which the United States took use and occupancy of the Flood Building, 870 Market Street, San Francisco, from February 1, 1951 to June 30, 1954. These actions were brought pursuant to the authority vested in the Administrator under sections 257 and 304c of title 40, U.S.C. (R. 3-4, 33-34), jurisdiction thereof being conferred upon the District Court by 28 U.S.C., sec. 1358. *See also:* 28 U.S.C., secs. 1331, 1345. Final judgment was entered in the consolidated cases on June 10, 1958 (R. 86-88). Thereafter on August 7, 1958, and within sixty days of the entry of judgment a notice of appeal was filed by appellants (R. 88). Jurisdiction of this appeal is conferred upon this Court by 28 U.S.C., sec. 1291.

QUESTION PRESENTED

The United States of America, taking the use and occupancy of a building under its power of eminent domain, has an unquestioned duty at the conclusion of the term of its taking to surrender the premises in the condition in which they were received, reasonable wear and tear excepted. Simply stated, the instant case raises the question of the measure of the just compensation payable under the Fifth Amendment to the United States Constitution when the Government, having altered the premises taken to suit its taste and convenience, elects to breach its duty and return the premises to their owner as so altered.

STATEMENT OF THE CASE

I. Case 30319—and the Government's Alteration of the Flood Building.

The first of the two actions before the Court was filed by the United States on January 29, 1951. By its Complaint

in Condemnation filed that day, the Government sought to take the right to use and occupy the entire Flood Building, 870 Market Street, San Francisco, for the housing of Federal agencies in the City and County of San Francisco (R. 3-7). This right was sought "for a term for years commencing February 1, 1951 and ending June 30, 1951, extendible for yearly periods thereafter at the election of the United States * * * no extension of said term to be made after June 30, 1955." (R. 4) Concurrently with the filing of its action, the United States secured an *ex parte* Order for Immediate Possession directing that possession of the building be delivered to the Government three days hence on February 1, 1951 (R. 8-9).

When the Government entered the Flood Building on February 1, 1951, it took a building in no way designed for the housing of Federal agencies. The Flood Building is a familiar San Francisco landmark fronting on Market, Eddy, Powell and Ellis Streets in downtown San Francisco (R. 28-29, 56-57). It is a steel frame, twelve-story, concrete, Class A Building with a sandstone and brick facing, covering an area of 30,000 square feet. *See: Defs.' Exhibits A, N, O, P, Q.* On February 1, 1951, the building's ground floor, with the exception of its lobby, was devoted to a number of stores fronting on Market, Powell, and Eddy Streets, being in the words of an expert witness of the government "one of the finest retail locations in the city" (R. 268). The second through twelfth floors of the building were devoted to office space. On the sixth through twelfth floors 117,257 square feet of rentable space was laid out for medical-dental occupancy, the building having accommodated 300 doctors and dentists (R. 119, 187, 392). The remaining four floors, which contained 50,923 square feet of rentable space, were designed for commercial tenancies, including commercial tenancies of the type characteristically found in

medical centers, that is, pharmacies, laboratories and similar allied enterprises (R. 119, 187).

The Flood Building is owned by appellants as trustees of the trust created by the will of their late father, James L. Flood, who constructed the building (R. 79). Although the medical-dental character of the Flood Building dates back many years, commencing in 1934 and continuing to 1945, the building owners pursued a course of modernizing its medical-dental suites (R. 120-121, 380-382). Following the lead of the newest medical-dental buildings in San Francisco, medical-dental offices were characteristically divided by partitioning walls into suites consisting of a number of rooms, reflecting the needs of the medical or dental practitioner. Although the Government on entry prepared plans showing the exact layout and condition of each floor of the building, which are before the Court as *Defendants' Exhibits F.1 to F.22,* inclusive, generally medical-dental suites were laid out with reception rooms, operating rooms, consultation rooms, business offices, laboratories, dressing rooms, X-ray developing rooms, and other space required for medical or dental practice. Serving these offices were medical and dental basins, sinks, lavatories, shelving, cabinets, recessed file drawers, casement windows, X-ray viewboxes, gas, compressed air and the electrical outlets required for medical and dental equipment. As a result of the program of modernization pursued, the medical-dental suites "were regarded as the equal to any medical-dental suites that were in any of the buildings in San Francisco" (R. 456). Although one government expert witness termed the suites "gold plated," it was obvious that even a gold-plated medical-dental suite is wholly unsuited for the housing of Federal agencies.

As a result, almost immediately after the Government entered the Flood Building, the General Services Adminis-

tration commenced preparing plans for the alteration of the premises, particularly plans for the demolition of the medical-dental and related suites. Without consulting the building owners, by April, 1951, the United States had embarked on the conversion of the Flood Building from a medical-dental building to a general Government office building. The great majority of the alterations made in the premises were made pursuant to written contracts, which were stipulated to have been fully performed and are in evidence. *See: Defs.' Exhibits E, G, G-1 to 7, inclusive, H-1 to 13, inclusive, I, J, K, L and M.* Graphically, the extent of the Government's demolition is shown on *Defs.' Exhibits G-1 to 6, inclusive, and H-1 to 12, inclusive,* which are alteration drawings showing the alterations made under the two largest alterations contracts. While reference to the foregoing contracts shows the alterations made by the United States suite by suite in the subject premises, it was stipulated by the parties at the commencement of trial *(Defs.' Exhibit E):*

> "That the plaintiff United States of America, after taking the use and occupancy of the Flood Building on February 1, 1951, and prior to the return of the subject premises made alterations upon the third to twelfth floors, inclusive, on said building, which said alterations included the demolition of partitions, the removal of electrical wiring and conduit, the removal of lavatories, sinks, workbenches, cabinets, shelving, viewboxes, closets, the removal of gas piping, air piping, electrical outlets and switches, the removal and relocation of radiators, the removal of plumbing fixtures, the cutting of doors through walls, and the painting of stained and bleached oak room trim."

When this program was completed not a single medical-dental suite remained in the Flood Building. In the transformation of a medical-dental office building to a Govern-

ment office building 1,474 electrical outlets were removed *(Defs.' Exhibit V)*. 190 gas connections and 188 air connections were ripped out *(Defs.' Exhibit W)*. 37 X-ray viewboxes were removed *(Defs.' Exhibit S)*. 52 casement windows were destroyed *(Defs.' Exhibit T)*. 13 recessed file cabinets were demolished *(Defs.' Exhibit AD)*. 113 so-called 450 Sutter type sink cabinets were removed *(Defs.' Exhibit Z)*. 266 twelve inch by twelve inch sinks were carried away *(Defs.' Exhibit Y)*. 158 vitreous china basins were appropriated and removed from the building *(Defs.' Exhibit X)*. And 107 450 Sutter type lavatories were removed from the building. At the same time 10,355.5 lineal feet of sheetrock partitions on wood studding were demolished, together with 2,401.5 lineal feet of gypsum block and plaster partitions *(Defs.' Exhibits A-I, AH)*. 987 doors of eight different types were carried off by the Government for use at other places *(Defs.' Exhibit AB)*. 2,088 lineal feet of laboratory workbenches were destroyed *(Defs.' Exhibit X)*. What this meant to the Flood Building can be seen in microcosm by examining *Defendants' Exhibits B and C*.

Defendants' Exhibit B shows the floor plan of a combined medical-dental suite on the eleventh floor of the Flood Building, which was divided into twelve rooms, including a doctor's operating room, a treatment room, a consultation room, labratory, a business office, a reception room, a dentist's business office, operating room and laboratory (R. 121-122). This suite the Government converted into three large rooms, tearing out all of the medical-dental fixtures. *See: Defs.' Exhibit G-2. Defendants' Exhibit C* shows a typical dental suite on the eleventh floor of the Flood Building in which offices numbered 1163 and 1165 were divided into a reception room, operating room, laboratory and business office. This suite was destroyed by the Gov-

ernment and converted into two large rooms, all of the special dental fixtures being removed. *See: Defs.' Exhibit G-2.*

While the United States was assiduously engaged in converting some 117,257 square feet of medical-dental space to general Governmental office space, it found itself wholly unable to utilize the Flood Building basement and the extremely valuable ground floor shops. Thus, with the exception of areas thereof required in connection with its occupancy of the second through twelfth floors, the United States on May 15, 1951, abandoned the basement and ground floor, filing a Notice of Dismissal and Abandonment (R. 9-11). Its right to so abandon a part of the building being opposed by defendants, who were thereby placed in an extremely difficult position, the United States elected not to extend the term of its occupancy under its Complaint, which expired on June 30, 1951.

II. Case No. 30675—and the Return of the Premises as Altered to Appellants.

Having elected not to continue possession of the Flood Building under the action filed on January 29, 1951, but desiring the continued use of the premises less those portions abandoned on May 15, 1951, the United States on June 29, 1951, filed a second action. By its Complaint in Condemnation, the United States sought the right to the use and occupancy of the second through twelfth floors of the Flood Building, plus portions of the ground floor and basement, for the housing of Federal agencies in the City and County of San Francisco (R. 33-38). Use was sought for "a term for years commencing July 1, 1951, and ending June 30, 1952, extendible for yearly periods thereafter until June 30, 1956, at the election of the United States" (R. 34). Electing to extend the term on two occasions, the Govern-

ment effected a continuous occupancy of the premises from February 1, 1951 until June 30, 1954, when the premises were surrendered to appellant owners. As a result the conversion of the Flood Building from a medical-dental building to a Government office building, which had started during occupancy under the first case, continued without interruption under the second case.

The exclusion of the ground floor and basement from the Government's taking presented a serious problem to the appellant trustees. In 1944 during World War II, the building owners, in the belief that post-war rentals would fall substantially below those then being realized, entered into a fifty-year lease of the premises with the F. W. Woolworth Co. (*Pl.'s Exhibit 33*). Under this lease the building was to be delivered to the Woolworth Company on February 1, 1951, which was to forthwith replace the building with a new structure (*Pl.'s Exhibit 30*). The lease expressly provided that "Landlord agrees to make diligent effort to deliver to Tenant physical possession of the demised premises on the first day of February, 1951. * * * If Landlord is unable to deliver possession of said premises on the date hereinabove set forth because of failure or refusal of Tenants to vacate, then the date of delivery shall be postponed until such time as such persons shall be removed and Landlord shall proceed with due diligence to cause the removal of all such persons * * *. The term of this lease, anything to the contrary notwithstanding shall not commence for any purpose until possession of said demised premises has been delivered by Landlord, free and clear as above provided * * *."

Thus, not only did the Government's taking preclude performance of the subject lease, but the obligations imposed upon the building owners by that lease precluded them from renting the ground floor shops and basement

abandoned by the Government. Having no way of knowing when the Government would surrender the space occupied by it, the owners had no means of knowing when they would be obligated to deliver the building to Woolworth. Faced with the cost of taxes and insurance on the ground floor shops while unable to rent them, the building owners entered into negotiations with the United States and with the Woolworth Company. The latter agreeing to take the ground floor and basement of the building if it could at the same time secure the second floor, the owners secured the release of the second floor from the United States on September 29, 1951, pursuant to Stipulation for Partial Dismissal (R. 39-41) and Order entered thereon (R. 41-42). Accordingly, a new lease was made by the Flood trustees with Woolworth, by the terms of which Woolworth constructed its long-planned downtown store in the basement, ground floor and second floor of the building, while the Government continued to occupy the third through twelfth floors of the building (*Pl.'s Exhibit 31*).

Confronted then with the necessity of resuming the management of the third through twelfth floors of the building at such time as the Government surrendered them, after consultation with their real estate advisers the trustees caused the following letter to be forwarded to the United States on December 30, 1953 *(Defs.' Exhibit AR)*:

> "United States of America
> c/o M. Mitchell Bourquin
> Special Assistant to United States Attorney
> 718 Crocker Building
> 620 Market Street
> San Francisco 4, California
>
> Re: U. S. v. Building known as Flood Building, 870 Market Street, San Francisco, Flood Estate, et

al., Nos. 30319 and 30675, U.S. Dist. Ct. for Northern Dist. of Calif., Southern Div.

Dear Sirs:

Under date of February 1, 1951, pursuant to the first action above mentioned, you took and entered the building known as the Flood Building located at 870 Market Street, San Francisco, California, and occupied same until June 30, 1951 (portions of the ground floor and basement of said building were allegedly abandoned by you on May 15, 1951). Under the second suit above mentioned you took and entered the second to the twelfth floors, inclusive, and a portion of the basement of said building, and are presently occupying said space under the taking in said second suit with the exception of the second floor which was voluntarily released under date of September 28, 1951.

Approximately 125,000 square feet of office space of said floors, now occupied by you, at the time of entry on February 1, 1951, were arranged with partitions, plumbing, lighting, heating, gas, floor coverings, etc., for occupancy as medico-dental space. We are informed, and believe, that after entry you demolished the special arrangements installed for adapting said space to medico-dental occupancy, presumably for the purpose of arranging said building for the convenience of the various agencies of the Government who were to occupy said space. A portion of said demolition took place during the occupancy by you under the first suit above mentioned and a portion during the occupancy by you during the second suit above mentioned. The exact portions of such demolition as may have taken place under said respective suits is unknown to us.

In The San Francisco News, under date of Friday, December 18, 1953, there appeared a news release which we have been informed emanated from the Department of General Services located in San Francisco. It was there stated that 'the Federal Government will move out of the Flood Building on June 30 and adver-

tise within a few weeks for bids for other quarters.' In other words, that the ten floors of office space now occupied by you under the second above mentioned condemnation suit will be turned back to the owners at the close of Wednesday, June 30, 1954.

Upon inquiry by us as to the truth of the matters set forth in said news release, we have received no denial, and we are informed by the local Department of General Services that it is the Government's intention to act as above indicated.

In view of the fact that some 168,000 square feet of office space will be returned to the owners as of July 1, 1954, we hereby demand on behalf of said owners that you restore, prior to July 1, 1954, the entire premises now occupied by you *to the condition that they were in at the time of entry by you on February 1, 1951*, ordinary wear and tear excepted

We point out to you at this time that such restoration is of great importance to us, and to you, as it will mitigate the damage incurred by reason of your taking, occupancy, demolition, and alterations of said premises. Demand is made at this time in order that you may promptly commence the restoration and complete same by July 1, 1954. We make this demand because it is our intention to again develop this building as a medico-dental center.

In like manner, this demand should not in any way inconvenience you as we understand that in excess of one-half of the space now held by you in the Flood Building is not in fact being used.

Yours very truly,

JAMES L. FLOOD and MARY EMMA STEBBINS as Trustees under Paragraph III of the Last Will and Testament of JAMES L. FLOOD, Deceased

By WALTER C. FOX, JR.
FREDERICK M. FISK
Their Attorneys"

This letter was never acknowledged by the United States, which on June 30, 1954, returned the premises to the building owners exactly as they had been altered to suit the taste and convenience of the Government in housing its agencies.

III. The Trial of the Consolidated Cases.

Since the two actions brought by the Government resulted in a continuous occupancy of the Flood Building commencing on February 1, 1951 and ending on June 30, 1954, on December 13, 1953 the two actions were consolidated for trial (R. 17, 44). Thereafter, following the Government's return of the premises, on October 1, 1954, the parties entered into written Stipulations fixing the compensation payable to appellant trustees under the respective actions for the use of the premises, except only the compensation payable by reason of the failure of the United States to restore the premises to the condition in which they were at the time of taking, ordinary wear and tear excepted (R. 18-22, 45-50). On each Stipulation a Final Judgment was entered on October 21, 1954, which expressly provided:

> "*It Is Further Ordered, Adjudged and Decreed* that jurisdiction of the Court is herewith retained to determine the amount of compensation, if any, which the aforesaid defendants shall be allowed by reason of the failure of the United States to restore the premises hereinabove described to the condition in which they were at the time of the taking, ordinary wear and tear excepted." (R. 32, 61.)

Thereafter, on January 25, 1956, pursuant to the foregoing reservation of jurisdiction, the consolidated actions came on for trial before the Honorable Oliver J. Carter, sitting without a jury. At the commencement of trial the parties entered into a written Stipulation, which was received in evidence as *Defendants' Exhibit E* (R. 94-95). By

this Stipulation the parties agreed (1) that the appellant trustees were the owners of the subject property and the persons entitled to receive all of the compensation determined to be payable; (2) that the United States had made certain described alterations in the premises; (3) that the alterations specified to be made in the Flood Building under specified contracts had been made; and (4)

> "11. That in addition to the alterations made in accordance with the contracts referred to in the preceding paragraphs 2 to 10, inclusive, of this Stipulation, certain other alterations were made in the subject premises by the United States, and the Flood Building was returned by plaintiff to defendants on June 30, 1954 without any restoration of the premises to their condition prior to alteration as aforesaid being made by plaintiff.
>
> "12. That the obligation, if any, of the United States to restore the 3rd to 12th floors, inclusive, of the Flood Building to the condition in which they were received, reasonable wear and tear excepted, accrued on June 30, 1954."

The defendant trustees in their case in chief adduced evidence that the reasonable cost as of June 30, 1954, of restoring the premises to the condition in which they were on February 1, 1951 when taken by the Government, was $600,652.29, that the time reasonably required to effect restoration was not less than six months and that the reasonable value of use of the premises for that period was $177,976.02. The Government in its case offered evidence that the reasonable cost of restoration as of June 30, 1954 was $401,000.00, that restoration could be effected in four months, and that the reasonable rental value of the premises for that period was $40,000. In addition, the Government was permitted to call two witnesses who, testifying as experts, over appellants' objections expressed the opin-

ion that the market value of the Flood Building as of July 1, 1951, was greater than it would have been had it been in the condition received from defendants on February 1, 1951. One of these witnesses testified that the property's market value was so enhanced by $225,000 (R. 269-270), while the other testified that the market value was increased on July 1, 1954 by $225,400 (R. 330)—exactly the amount which the Government spent three years earlier in altering the premises to suit its taste and convenience (R. 354)![*] Having received the Government's evidence as to market value, the appellant trustees called on rebuttal their real estate adviser, Mr. Colbert Coldwell of Coldwell Banker Company, who had advised the trustees to make demand upon the Government for restoration of the premises (R. 405-408). Mr. Coldwell detailed the reasons why in his opinion it was desirable to have medical-dental space in the Flood Building (R. 403-405). In his opinion the market value of the building on June 30, 1954, would have been $400,000 greater had the Government restored the premises to the condition in which they were received (R. 431-435). At the same time, Mr. Coldwell testified that the market value of a building such as the Flood Building on a given date is of relative

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*The testimony that the market value of the premises as of July 1, 1954, was increased by exactly the sum of the Government's alterations rested on a series of paradoxes and the assumption that the building could not secure medical-dental tenants. The Government witnesses, however, conceded that the Flood Building "is one of the finest retail locations in the city" (R. 268), that it is a "beautiful building" which will produce many years of income (R. 293) and that "there is an absolute need for medical buildings in the downtown section of any city" (R. 313). They did not question the fact that doctors are presently housed in downtown San Francisco in poorer quarters than those which the Government destroyed (R. 417-418, 452) or that had the Government discharged its obligation to restore, the Flood Building could profitably have offered its medical-dental space at rentals substantially below that being charged for comparable facilities (R. 452, 456-459). Suffice it to say, the Court rejected the suggestion of such claimed enhancement of value (R. 83).

unimportance to an owner who has no desire to sell the property, the significant consideration to such an owner being the integrity of his property and the continuity of income (R. 425-426).

The cause being submitted for decision on May 11, 1956, the District Court on December 19, 1957, rendered its Memorandum Decision (R. 77), after which Findings of Fact and Conclusions of Law were filed on June 10, 1958 (R. 77-85) and Judgment entered the same day (R. 86-88) holding the appellants entitled to take nothing.

IV. The Decision of the District Court.

In holding that the appellant trustees were entitled to take nothing, the District Court did not question that the Government had had an obligation to restore the premises to the condition in which they had been taken or that that duty had been breached. To the contrary, by its Conclusions of Law, the District Court expressly stated (R. 84):

> "II.
>
> On June 30, 1954, the United States of America, having altered the third through the twelfth floors of the Flood Building to suit its taste and convenience, was under an obligation to return those premises to the defendant trustees in the condition in which they had been received by it on February 1, 1951, reasonable wear and tear excepted.
>
> "III.
>
> The United States of America in returning the third through twelfth floors of the Flood Building to the defendant trustees on June 30, 1954, in the condition to which they had been altered to suit its taste and convenience and without restoring the same to the condition in which they were received by it on February 1, 1951, reasonable wear and tear excepted, breached its said obligation to the defendant trustees."

Despite the fact that the Government had so breached its stated obligation, the Court held that the appellant trustees were powerless to secure any redress for the deprivation of their rights; that the Government was free to not only appropriate their property from the building but to studiously ignore its duty. This startling result the District Court explained as follows despite the absence of any judicial authority therefor (R. 85):

> "Since the market value of the Flood Building when returned to defendants on June 30, 1954, was as great as it would have been had it been returned on that date in the condition in which it was taken on February 1, 1951, the United States of America owes no sum to defendants as just compensation for its failure to restore the premises to the condition in which they were received, and defendants are entitled to take nothing."

STATEMENT OF POINTS TO BE URGED

1. The District Court's judgment denies appellants just compensation for the taking of their property in contravention of their rights under the Fifth Amendment to the United States Constitution.

2. The Court erred in holding that the United States had no liability to the appellants for its breach of its obligation to appellants to return the premises, the use and occupancy of which was taken by it, to appellants in the condition received by it on February 1, 1951, reasonable wear and tear excepted (R. 89-90).

SUMMARY OF ARGUMENT

By the two actions before this Court the United States took for the housing of Federal agencies the use and occupancy of the Flood Building from February 1, 1951, to June 30, 1954. Upon taking possession of the premises, the Gov-

ernment embarked upon a program of extensive alteration under which extensive medical-dental facilities were destroyed and the building converted to a Government office building. In the course of this program the United States appropriated for its own use thousands of dollars of fixtures, which it removed from the building.

On June 30, 1954, the United States returned the premises taken to the appellants, electing to breach its unquestioned duty to restore the premises to the condition in which they had been received on February 1, 1954. This constituted a taking by the United States separate and distinct from its taking of use and occupancy and as a consequence thereof appellants were entitled to just compensation as guaranteed by the Fifth Amendment. *United States v. General Motors Corp.*, 323 U.S. 373 (1945); *Kimball Laundry Co. v. United States*, 338 U.S. 1, 7 (1949). The "taking" effected being no different than the deprivation which occurs when a tenant breaches his covenant to surrender property in the condition received, the standard by which just compensation is assessed is the cost to the owner of doing what the Government was obligated to do. *Kimball Laundry Co. v. United States, supra; United States v. Certain Parcels of Land*, 55 F. Supp. 257 (D. Md. 1944). Thus, the constitutional guarantee of "just compensation" which is measured by a standard of "external validity" divorced from any subjective relation of the parties to the property has been uniformly held to require that the United States upon breach of its unquestioned duty pay to the landowner the reasonable cost of restoring the premises to the condition in which the Government was obligated to return them and the reasonable rental value of the premises for the period reasonably required to effect that restoration. *See e.g. United States v. 37.15 Acres of Land*, 77 F. Supp. 798 (N.D. Cal. 1948).

ogy the United States Supreme Court in a series of decisions held that the just compensation payable for use and occupancy taken under the power of eminent domain is "market rental value." *United States v. General Motors Corp.,* 323 U.S. 373 (1945); *United States v. Petty Motor Co.,* 327 U.S. 372 (1946); *Kimball Laundry Co. v. United States,* 338 U.S. 1 (1949). However, it was evident that "market rental value" in given cases would fall short of meeting in full the constitutional requirement of just compensation. Thus, a lessor letting property receives more from his tenant than the reserved rental. In granting the *use* of his property a lessor's reversion is safeguarded by certain covenants arising by operation of law. Specifically, in the absence of express provision to the contrary, a tenant is under an implied duty to abstain from waste. *United States v. Bostwick,* 94 U.S. 53 (1876). This implied duty renders any alteration of the demised premises by the tenant during occupancy tortious, whether or not such unauthorized alteration enhanced the market value of the lessor's property. *Bass v. Metropolitan West Side El. R. Co.,* 82 Fed. 857 (7th Cir. 1897); *F. W. Woolworth Co. v. Nelson,* 204 Ala. 172, 85 So. 449 (1920); *Agate v. Lowenbein,* 51 N.Y. 604 (1874). *See also:* Note, 9 A.L.R. 445 (1920). Breach of such duty entitles the landlord to redress, either by injunctive relief (*Bass v. Metropolitan West Side El. R. Co.,* 82 Fed. 857 (7th Cir. 1897); *United States v. Parrott,* Fed. Cas. No. 15,998 (1858)) or by the recovery of money damages. *Isom v. Book,* 142 Cal. 666, 76 Pac. 506 (1904). A further right secures the lessor's right to have his property returned to him in the condition in which it was let. By operation of law, absent agreement to the contrary, a tenant assumes the obligation to surrender demised premises at the conclusion of his occupancy in the condition in which they were received, reasonable wear and tear excepted.

This obligation becomes an implied covenant of the lease. *United States v. Jordan*, 186 F.2d 803, 806 (6th Cir. 1951); *Lane v. Spurgeon*, 100 Cal. App. 2d 460, 223 P.2d 889 (1950). In the event that a tenant breaches this duty, a contract action lies with the landlord. *See: Appleton v. Marx*, 191 N.Y. 81, 83 N.E. 563 (1908); *Willoughby v. Atkinson Furnishing Co.*, 93 Me. 185, 44 Atl. 612 (1899); *Shafer Bros. Land Co. v. Universal Pictures Corporation*, 188 Wash. 33, 61 P.2d 593 (1936).

Obviously, to grant the United States greater rights than a lessee obtains by the payment of "market rental value" would entail a windfall for the government and a deprivation for the owner wholly inconsistent with the constitutional guaranty of just compensation. While "market rental value" compensates the owner for the *use* of his property and reasonable wear and tear thereof, by definition it does not compensate for damage or destruction of the premises or for depreciation beyond reasonable wear and tear. Thus, the United States Supreme Court categorically held in *United States v. General Motors Corp.*, 323 U.S. 373, 383-384 (1945):

> "For fixtures and permanent equipment destroyed or depreciated in value by the taking, the respondent is entitled to compensation. An owner's rights in these are no less property within the meaning of the Fifth Amendment than his rights in land and the structures thereon erected. And it matters not whether they were taken over by the Government or destroyed, since, as has been said, destruction is tantamount to taking. This is true whether the fixtures and equipment would be considered such as between vendor and vendee, or as a tenant's trade fixtures. In respect of them, the tenant whose occupancy is taken is entitled to compensation for destruction, damage or depreciation in value. And since they are property distinct from the right of occu-

> pancy such compensation should be awarded not as part of but in addition to the value of the occupancy as such."

The Supreme Court's holding that the confiscation and destruction of the owner's fixtures is a constitutional "taking" for which "just compensation" must be paid cannot be reconciled by any semantic ingenuity with the District Court's denial of *any* compensation whatsoever in these cases for such a "taking." The *General Motors* decision having laid at rest any doubt as to the right to just compensation for a "taking" such as that here before the Court, it is pertinent to observe that the Court in *Kimball Laundry Co. v. United States,* 338 U.S. 1, 7 (1949), elaborated on the basis for awarding such compensation, stating:

> "The courts below also awarded compensation to petitioner for damage to its machinery and equipment in excess of ordinary wear and tear, the award of rental having been adjusted to include an allowance for normal depreciation. The Government does not object to this award, but we think it appropriate to point out that we find it justified on the theory that such indemnity would be payable by an ordinary lessee though not fixed in advance as part of his rent because not then capable of determination."

Despite the Supreme Court's reference to the law of landlord and tenant as a standard for measurement of the compensation payable for the "taking" in question, the District Court professed to find a conflict in the landlord-tenant cases permitting it to follow a line of cases that in its judgment allowed a denial of any compensation for the taking before it—a result that the *General Motors* case renders impossible. Deferring for the moment consideration of the cases to which the District Court has alluded, it is

clear that the Supreme Court's reference to "such indemnity [as] would be payable by an ordinary lessee" is not a reference to a handful of cases which arguably abnegate the right to compensation for breach of a tenant's covenant. It clearly refers to the large body of landlord-tenant cases measuring a tenant's liability for breach of his covenant to surrender demised premises in the condition received by it by the cost of securing what the tenant was obligated to do. *See e.g. Storr v. Keljik,* 178 Minn. 391, 227 N.W. 211 (1929); *Braem v. Washington Piece Dye Works,* 100 N.J.L. 209, 126 Atl. 461 (1924); *Kennedy v. Loose-Wiles Biscuit Co.,* 94 Pa. Super. 602 (1929); *Abrams v. Sherwin,* 86 Pa. Super. 189 (1925); *Ventrees v. Tennessee Auto Corp.,* 5 Tenn. App. 140 (1927); *Delano v. Tennent,* 138 Wash. 39, 244 Pac. 273 (1926); *Wollard v. Schaffer Stores Co.,* 272 N.Y. 304, 5 N.E. 2d 829, 109 A.L.R. 1262 (1937); *Davis v. Allen,* 97 Utah 285, 92 P.2d 1100 (1939); *Treharne v. Klint,* 324 Ill. App. 546, 58 N.E. 2d 638 (1945); *Mackintosh v. Cioppa,* 245 Mass. 152, 139 N.E. 445 (1923); *Reinheimer v. Mays,* 75 Okla. 131, 182 Pac. 230 (1930); *Vaughn v. Mayo Milling Co.,* 127 Va. 148, 102 S.E. 597 (1920); *Cawley v. Jean,* 218 Mass. 263, 105 N.E. 1007 (1914). This rule is, of course, that dictated by basic contract concepts. 1 A.L.I., *Restat. of Contracts,* § 329 (1932). To hold that a landlord has the rights conferred by such a covenant and to deny him on breach the sum required to obtain the performance of the tenant's obligation presents the same absurdity as a holding that there has been a "taking" but that the condemnee may not receive just compensation for the property taken.

Singularly apposite to the case at bar and the District Court's willingness to allow the Government to escape its unquestioned duty by claiming that the appellant trustees suffered no "damage" by the Government's default is *Wil-*

loughby v. Atkinson Furnishing Co., 93 Me. 185, 44 Atl. 612 (1899). There a tenant, having altered demised premises to suit his taste and convenience, surrendered them to his landlord breaching his covenant to return the same in the condition received, reasonable wear and tear excepted. In an action brought for the breach of his covenant, the tenant took the position here adopted below, namely, "that the measure of damages is the injury, if any, to the market value of the property; that, if the alterations made by the lessee enhance the market value of the property, no damages would be recoverable upon this branch of the case." In rejecting the tenant's efforts to subvert his obligation and escape liability on this ground, the Court held:

> "The defendant cannot say, in answer to a claim for damages for nonperformance of its covenants, that the radical changes voluntarily made by it enhanced, or did not diminish, the value of the property. The owner was entitled to exercise his own judgment as to the interior arrangement of his own building. * * * The rule as to the measure of damages is a simple one. It is the cost of doing what the defendant covenanted to do but did not do,—the cost of replacing the partitions and restoring the building to the same condition, so far as these voluntary alterations are concerned, as it was in when leased." 44 Atl. at 614.
>
> *See also: Trick v. Eckhouse,* 82 Ind. App. 196, 145 N.E. 587 (1924); *Appleton v. Marx,* 191 N.Y. 81, 83 N.E. 563 (1908).

Obviously, to hold otherwise would deny the lessor the benefit of the covenant, the value of which cannot be contested by a defaulting lessor. That in some few cases courts have denied a lessor the benefit of his lessee's engagement, cannot possibly constitute a ground for denying a condemnee his constitutional right to just compensation as

enunciated by the Supreme Court in the *General Motors* and *Kimball* cases.*

II. The Decided Use and Occupancy Decisions Consonant with the Dictates of the United States Supreme Court Have Uniformly Held That the Just Compensation Payable for Takings Such as That Before the Court Is Measured by the Obligation Breached by the Government.

The District Court's denial of just compensation to the appellant trustees flies squarely into the teeth of its own conclusion that the United States "was under a duty to return those premises to the defendant trustees in the condition in which they had been received by it on February 1, 1951, reasonable wear and tear excepted" and that:

> "The United States of America in returning the third through twelfth floors of the Flood Building to de-

*The District Court points to five cases which it regards as analogical authority for the denial of any compensation for the subject taking (R. 73-74). In none of those cases were factual situations comparable to that before the Court considered. *Crystal Concrete Corp. v. Baintree*, 309 Mass. 463, 35 N.E. 2d 672 (1941), was an action in equity apparently for waste, based upon the wrongful removal of a profit á prendre from unimproved land. *Fuselier v. United States*, 111 F. Supp. 471 (D. La. 1953), turned on an interpretation of a Louisiana statute, the court stressing that alterations made on 5 acres had no effect on the use or farming operations carried on on the 160-acre tract of which they were a part. In *Henry H. Cross Co. v. Rice*, 45 F.2d 940 (7th Cir. 1930), a tenant's liability for unreasonably depreciating certain refining equipment was measured by the diminution in value of that equipment. In *Georgia Kaolin Co. v. United States*, 214 F.2d 284 (5th Cir. 1954), the United States having returned demised land containing kaolin deposits, which it had impregnated with live shell, the Court refused to hold it liable for "the full money value of the kaolin deposits in the ground," the Government's liability being limited by the lease. *Realty Associates v. United States*, 138 F. Supp. 875 (Ct. Cl. 1956), is so unique that it must be read to be appreciated. Suffice it to say, the Court found the factual situation presented so extreme that it deemed Mark Twain better authority than the rules of contract law (138 F. Supp. at 878)! It is doubtful that any of these cases can be read, as the District Court has read them, to leave it to sound discretion of the trial court whether or not a lessor shall be compensated for breach of his tenant's covenant.

> fendant trustees on June 30, 1954, in the condition to which they had been altered to suit its taste and convenience and without restoring the same to the condition in which they were received by it on February 1, 1951, reasonable wear and tear excepted, breached its said obligation to defendant trustees." (R. 84)

It is best characterized by the famous Holmes dictum that "Rights without remedies are ghosts that stalk across the legal stage elusive to the grasp." Suffice it to say, there is no extant authority for so emasculating the rights of a condemnee.

With the advent of temporary takings, it was recognized that public use might well necessitate alteration of premises used by the United States, and, unlike the tenant whose alterations would constitute waste, the Government upon taking temporary use was held entitled to alter premises to suit its taste and convenience. *See e.g. United States v. 14.4756 Acres of Land,* 71 F. Supp. 1005 (D. Del. 1947); *United States v. 16.747 Acres of Land,* 50 F. Supp. 389 (D. Del. 1943); *In re Condemnation of Lands,* 250 Fed. 314 (E.D. Ark. 1918). Such a concession to the exigencies of governmental use was deemed to impose no hardship on the owner, who enjoyed the right to receive his property at the conclusion of governmental use in the condition in which it had been taken, subject only to reasonable wear and tear. *See e.g. United States v. 37.15 Acres of Land,* 77 F. Supp. 798 (N.D. Cal. 1948); *United States v. 14.4756 Acres of Land,* 71 F. Supp. 1005 (D. Del. 1947). Consistent with the constitutional guaranty, this right was treated as one of substance. The landowner was entitled to have his property returned as it was taken from him or to receive as just compensation the sum required to restore it to that condition. Thus, in the first reported taking of use and

occupancy, *In re Condemnation of Lands*, 250 Fed. 314, 315 (E.D. Ark. 1918), Judge Trieber held:

> "In addition to these payments [i.e. rental value], the government must obligate itself * * * that, when it surrenders the land to the owner, it will be returned to him in as good a condition as when it took possession, the natural wear and tear excepted. If the owners have been compensated in the action for the improvements, then, of course, it will not be required to replace them, or pay again for them. If the improvements, for which there has not been compensation, are not replaced, or the lands are not returned in as good condition as when the government took possession of them, natural wear and tear excepted, it is to pay such sums as damages as will enable the owner to put the land back in the condition it was, when the government took possession."

Similarly, in *United States v. 37.15 Acres of Land,* 77 F. Supp. 798 (N.D. Cal. 1948), where the United States altered the Ahwahnee Hotel during temporary occupancy and returned the premises to the owner without restoration, the Court held:

> "It is not, and clearly could not be, disputed that the United States was obligated to return the hotel together with its equipment and furnishings, to the owner upon the termination of the term, in as good a condition as when received, reasonable wear and tear thereof excepted. Until the United States did so return the property, both real and personal, in such condition it, of course, was liable for the fair market value of the use of the property since the taking had not yet terminated. * * * However, the government elected not to restore the premises, repair the damage caused to real and personal property lost or destroyed, but left that to be done by the owners. Therefore it would follow that the United States is liable for the reasonable cost of restoring the premises and personal

> property and also for the reasonable value of the use of the premises during the period of time required to accomplish such restoration. The reasonable rental value of the premises during the period of restoration would not then be consequential damages not compensable under applicable condemnation law, but it is the very amount that the government would have been required to pay in any event during the time that it would have taken the government to have repaired and restored the premises, their furnishings and equipment." 77 F. Supp. at 802-803.
>
> *See also: United States v. Certain Parcels of Land,* 55 F. Supp. 257, 264 (D.Md. 1944).

Indeed, prior to the present decision of the District Court every court faced with compensating an owner for breach of the Government's obligation deemed this liability for just compensation to "follow" from the obligation giving rise to the right to compensation. Thus, in *United States v. 266.33 Acres of Land,* 96 F. Supp. 647, 648 (W.D. Wash. 1951) rev. other grds sub nom. *Philips v. United States,* 206 F.2d 867 (9th Cir. 1953), it was observed:

> "It is conceded by both parties that under the law the owner on a term-taking (i.e., less than the fee) is entitled to have the property restored to the condition it was in at the time of taking, or to receive therefor a compensatory amount which would enable him to place his property in that condition."

In *United States v. One Parcel of Land,* 131 F. Supp. 443, 446 (D. D. C. 1955), the Court stated the same principle succinctly:

> "The Government at its election could make full, partial, or no restoration, being liable for the reasonable cost of whatever restoration had not been completed, less reasonable and ordinary wear and tear from normal use, and reasonable rental for the period while restoration was completed."

To adopt the position taken below that the Government has a duty to restore, that an owner whose premises are taken temporarily for public use has a right to have those premises returned in the condition in which they were taken, but that the owner has no remedy whatsoever for breach of that obligation and deprivation of that right, presents an absurdity. Indeed, an unbroken line of decisions has recognized what is indeed self evident, namely, that to give the Government's unquestioned duty substance, that duty must measure the Government's liability upon breach.* Clearly, the District Court errs when it tells ap-

*The District Court is clearly in error in stating that there are two cases "wherein the measure of damages for changes made by the government was defined in terms of the diminuation in value occasioned to the premises." (R. 69-70). In *United States v. 60,000 Sq. Feet of Land*, 53 F. Supp. 767 (N.D. Cal. 1943), the United States having taken the temporary use of Hotel Oakland commenced its conversion to a military hospital. Upon pre-trial conference the question was presented "Is the *right to alter* the premises to be evaluated and compensation therefor awarded?" (53 F. Supp. at 769). The Court answered its question in the affirmative on the ground that the owner was entitled to have all compensation assessed in a single proceeding and could not be required to await the property's return. *But cf. United States v. Westinghouse Co.*, 339 U.S. 261 (1950); *Kimball Laundry Co. v. United States*, 338 U.S. 1, 7 (1949). This "right to alter," the Court ruled, would be measured by diminution of "market value." In claiming that no recovery could be had for any right to alter, the United States "contended no present detriment warrants present assessment of damages, inasmuch as the government is obligated to eventually return the property, subject to wear and tear, in its condition at the time of taking" (53 F. Supp. at 770). Indeed, the very counsel who tried this case for the government there assured the Court in his brief that detriment was impossible, since his words, "Where the Government, either pursuant to agreement or lease, or by exercise of its power of eminent domain, occupied premises temporarily and surrendered them back to the owner in a damaged condition, recovery has been allowed as for breach of covenant, rather than for damages for any tortious act."

The other case cited by the District Court is *United States v. 5,901.77 Acres*, 65 F. Supp. 454 (N.D. Cal. 1946). In permitting an amendment to a complaint the author of the *Hotel Oakland* case cited his prior decision in holding the owner suffered no detriment by the amendment. The rule which that Court held applicable

pellants that they are not damaged by the loss of their rights and that, accordingly, the Government may disregard its duty without any liability for just compensation. *Cf. Willoughby v. Atkinson Furnishing Co.*, 93 Me. 185, 44 Atl. 612 (1899).

III. The Decision of the District Court in Fictionalizing the Government's Obligation to Appellant Trustees Not Only Permits the Sovereign to Profit by Disregarding its Citizens' Rights but Allows the Government to "Compensate" an Owner Over His Objection in Other Than Money.

Although the District Court expressly acknowledges the unquestioned duty of the United States to the appellant trustees and the breach of that duty, it denies them any compensation whatsoever. The words of the Supreme Court are indeed apposite: "If such a result be sustained, we can see no limit to utilization of such a device; and, if there is none, the Amendment's guaranty becomes, not one of just compensation for what is taken, but an instrument of confiscation fictionalizing 'just compensation' into some such concept as the common law idea of a peppercorn in the law of seizin or the later one of 'value received' in that of contractual consideration." *United States v. General Motors Corp.*, 323 U.S. 373, 381-382 (1945). Indeed, in considering the fictionalization of the duty which the District Court acknowledged, the further admonition of the *General Motors* case is relevant: "Here the use of warehouse for a short term was taken. The property might have been the General Motors factory. Or several plants. Or a modest store or home. Whatever of property the citizen has the government may take." 323 U.S. at 382.

The District Court here announces, what has never been previously suggested, namely:

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to the situation presented in the instant cases is set forth in *United States v. 37.15 Acres*, 77 F. Supp. 798 (N.D. Cal. 1948), which has been discussed above.

> "Where the United States of America, having taken under its power of eminent domain the right to the temporary use and occupancy of a building, alters that building and returns the same at the conclusion of its occupancy without restoring the same to the condition in which it was received, reasonable wear and tear excepted, the Fifth Amendment to the Constitution of the United States of America requires the Government to pay as just compensation for its failure to restore only the diminution in the market value of that building as of the date of its return when that sum is less than the cost of restoration." (R. 84-85)

Honest men meet their obligations whether or not their financial self interest is thereby served. A lessor has the important right to choose as lessees only those whose integrity he trusts—a right more valuable than the right to enforce a covenant in litigation. However, a condemnee has no right to select his condemnor. The appellant trustees could not stop the United States from stripping their building, carrying off the building's improvements, and altering the premises as it chose. They could only look to the Government to meet the obligation which it assumed and absent compliance with its obligation to the Court. However, the District Court lays down a rule that allows the Government to profit by its wrong! It is a basic concept of our jurisprudence that no man shall profit by his wrong. Compare what has here transpired. Thousands of dollars of valuable property has been removed from the Flood Building. To look at a single example, the Government removed from the Flood Building 987 doors, which even it conceded could not have been replaced for less than $151,394.60. These doors it took for use wherever it chose. The District Court holds in effect that appellants' doors and other equipment were a gift for which there was no cost or obligation. In short, it rewards the United States

for a default which would find condemnation in the market place. It establishes, contrary to every decision that has considered the Government's liability, a novel measure of liability upon breach of the Government's obligation, which in all cases in which the cost of improvements is not fully reflected in market value, will make breach financially preferable to discharge of that obligation. Moreover, the stated rule renders the owner's right to the return of his property in the condition in which he placed it for reasons sufficient to himself, contingent upon the plausibility of market value evidence given by experts selected to exonerate the Government's default.

While the notion that the United States should be allowed to profit from its wrong is repugnant, it is evident that the measure of liability adopted by the Court is bottomed on a glaring fallacy. The appellant trustees having been denied their rights arising under the unquestioned duty of the United States, the District Court held that "The owners here have simply failed to demonstrate that they have suffered any pecuniary deprivation" (R. 75). This result is reached because the Court concluded that on June 30, 1954, the market value of the building returned was as great as the market value of the building which it was obligated to return. Presumably, had the latter been more valuable on the date of judgment, four years after the valuation date adopted (R. 86-88), the Court would nevertheless have claimed the absence of "any pecuniary deprivation," since the owners, despite the Government's breach, received on June 30, 1954, something which presumably could have been sold on that date for as much as the building that they were entitled to receive. However, it is axiomatic that the United States cannot meet its obligation for just compensation under the Fifth Amendment by barter. 3 *Nichols on Eminent Domain* 11 (3rd ed. 1950). Consonant with the common

law rule that, absent agreement to the contrary, "payment" must be made in money, as early as *Vanhorne's Lessee v. Dorrance*, 2 U.S. (Dall.) 303, 315 (1795), it was held:

> "Compensation is a recompense in value, *a quid pro quo*, and must be in money. True it is, that land or anything else may be a compensation, but then it must be at the election of the party; it cannot be forced upon him. His consent will legalise the act, and make it valid; nothing short of it will have the effect."
>
> *Cf. Collier v. Merced Irr. Dist.*, 213 Cal. 554, 566, 2 P.2d 790 (1931).

Since then it has been steadfastly acknowledged that under the Fifth Amendment, "Such compensation means the full and perfect equivalent *in money* of the property taken." *United States v. Miller*, 317 U.S. 369, 373 (1943). The District Court's suggestion that the measurement of just compensation by the cost of doing what the Government was obligated to do, involves the reimbursement of the owners "for particular values which they attach to the building" (R. 76) is clearly untenable. As the law of contracts predicates general damages for breach of a covenant upon the cost of securing performance of that covenant, to so measure the just compensation payable upon breach of the Government's obligation by that obligation is to adopt a standard of "external validity" in keeping with and demanded by *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949). Such is implicit in all of the prior cases addressed to breach of the Government's obligation. *See e.g. United States v. 37.15 Acres*, 77 F. Supp. 798 (N.D. Cal. 1948).

CONCLUSION

In bringing the instant actions and taking use and occupancy of the Flood Building, the United States elected to assume the obligations created by such a temporary taking.

Among these obligations was the obligation at the conclusion of its occupancy to return the Flood Building to the appellant trustees in the condition in which it had been received by the Government on February 1, 1951. Had the United States desired to avoid this obligation, it was free to take the fee and upon the conclusion of use sell the building, assuming the risks entailed in its experts' opinion of market value. Having assumed the duty to restore, the United States' breach of that obligation constituted a "taking" for which appellant trustees are entitled to "just compensation" in money. "Just compensation" cannot be paid, as the District Court assumes, by the delivery to the appellants of an altered building of equal or greater value than that taken. When the United States elects to take only "use and occupancy," the owner retains the right "to exercise his own judgment as to the interior arrangement of his own building"—even if Government witnesses believe his judgment unsound. In denying the appellant trustees any compensation for the Government's taking, the appellants have been denied their constitutional right through a fictionalization of the Government's obligation. That obligation must, as heretofore held, measure the Government's liability upon breach. To grant the owner less than the sum required to do what the Government was obligated to do, not only deprives the owner's rights of substance but allows the Government to profit by its disregard of its citizens' rights. No case could more clearly point up the evils of granting the sovereign the right to abide or not to abide by its obligations than those before the Court, where the owners have been denied not only the wherewithal to secure the performance of the Government's obligation, but have seen the Government without recompense of any kind carry thousands of dollars worth of property from their premises for use elsewhere. In short, the District Court's decision

holding that appellants have no means whatsoever of enforcing their unquestioned rights, sanctions an unconstitutional confiscation.

It is respectfully submitted that the mandate of the Fifth Amendment requires that the judgment of the District Court be reversed with direction that appellants receive as just compensation for the Government's taking the amount reasonably required to do what the Government was obligated to do but elected not to do—the reasonable cost of restoring the premises to the condition in which they were taken on February 1, 1951, and the reasonable rental value of the premises in the condition in which the Government was obligated to surrender them for the period reasonably required to effect that restoration.

Respectfully submitted,

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WALTER C. FOX, JR.
CHICKERING & GREGORY
Attorneys for Appellants.

(Appendix Follows)

Appendix

RECORD REFERENCE TO EXHIBITS

Exhibit	Identified	Offered in Evidence	Received in Evidence
A		113	113
B		122	122
C		121	121
D		122	123
E		95	95
F-1		96	96
F-2		96	96
F-3		96	96
F-4		97	97
F-5		97	97
F-6		97	97
F-7		97	97
F-9		97	97
F-10		97	97
F-11		97	97
F-12		97	97
F-13		98	98
F-14		98	98
F-15		98	98
F-16		98	98
F-17		98	98
F-18		98	98
F-19		98	98
F-20		98	98
F-21		99	99
F-22		99	99
G		102	102
G-1		99	99
G-2		99	99
G-3		99	99
G-4		100	100
G-5		100	100
G-6		100	100
G-7		102–3	104
H-1		100	100
H-2		100	100
H-3		100	100
H-4		100	100
H-5		101	101
H-6		101	101
H-7		101	101
H-8		101	101
H-9		101	101
H-10		101	101
H-11		101	101
H-12		101	101
H-13		104	104
I		107	107
J		107	107
K		107–8	108
L		108	108
M		109	109
N		114	114
O		115	115
P		115	115
Q		116	116
R		123	123
S		125	125
T		126	126
U		127	127
V		128	128
W		129	129
X		130	130
Y		130	131
Z		132	132
AA	132	161	162
AB		134	134
AC		146	146
AC-1		173	173
AD		148	148
AD-1		174	174
AE	150		
AF		151	151
AF-1		172	172
AG		154	154
AG-1		156	156
AH		159	159
AI		161	161
AJ		163	163
AK		171	171
AL		176	176
AM		177	177
AN		178	178
AO		179	179
AP		182	182
AQ		189	190
AR		193	193
AS	—	—	—
AT	—		
AU	—		
AV	413		
AW		—	—

Exhibit	Identified	Offered in Evidence	Received in Evidence
AX-1		—	—
AX-2		—	—
1		—	—
2	—	218	218
3	—		
4	—	—	—
5	—		
6	—		
7	—	—	—
8	203	204–5	205
9	—	—	—
10A	—	222	222
10B	—	223	223
10C	—	223	223
11A	—	224	224
11B	—	225	225
12A	225	226	226
12B	225	226	226
13A	226	227	227
13B	226	227	227
14A	227	229	229
14B	227	229	229
15A	—	230	230
15B	—	230	230
16A	—	231	231
16B	—	231	231
17	232	232	232
18	232	233	233
19	—	234	234
20	234	234	235
21	235	236	236
22	236	237	237
23	237	238	238
24	—	238	238
25	239	240	240
26	240	241	241
27A	241	242	242
27B	241	242	242
28	—		
29			
30		316	318
31		316	318
32		320	320–
33		321–2	322
34		—	—
35		—	—
36		—	—
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43	450		
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45		—	—